

DC Board of Zoning Adjustment

RE: BZA Case #18888; Appeal of the Building Permit # 1309151

February 3, 2015

[draft – incomplete as of 4:50pm 2/3/15]

PETITIONER'S FINDINGS OF FACT & CONCLUSIONS OF LAW

Procedural Facts

1. On September 24, 2014, Petitioners filed BZA Appeals Case #18888.
2. Petitioner's appeal concerns itself with two zoning spheres: Rear Yard requirements and Rooftop requirements. EXHIBIT XXX.
3. On January 13, 2015, the Board of Zoning Adjustment held a hearing on BZA Case #18888.
4. At the January 13, 2015 hearing, Commissioners took up Intervenor's Motion to Dismiss the case for being untimely and for lack of merit. EXHIBIT XXX.
5. The BZA heard arguments from all parties about Intervenor's Motion to Dismiss, but did not yet rule on the motion.
6. At the end of the hearing, the BZA asked parties for post-hearing submissions. Transcript Page 115, Lines 11 to 18.
7. As ordered, Petitioner's submit these Findings of Facts and Conclusions of Law.

Findings of Fact: Timeliness

8. Petitioner's took photographs on July 24, 2014, showing "vertical" construction was well underway at the subject site. *See Exhibit #14C, Pages 3 & 4.*
9. Petitioner's sent an email that same day, dated July 24, 2014, addressed to Respondent, DCRA, including the DC Zoning Administrator, Matthew LeGrant. *See Exhibit #14A.*
10. The Petitioner's email states that a visit to DCRA's online permit system, referred to as "PIVs", showed that DCRA had not yet issued the required building permit to the Intervenor at that time despite the fact that "vertical" construction had started at the subject site. *See Transcript, Page 56, Lines 7 to 12.*
11. Petitioner's email stresses concern about construction at the subject site given that the DC Court of Appeals summarily reversed rooftop variances granted for the subject project. *See BZA Final*

Order in Case #18506 shown as Exhibit #14E, Pages 15 to 30, under "Attachment 2"; See also, DC Court of Appeals Judgment remanding variances granted in BZA Case #18506 shown as Exhibit #14E, Pages 31 to 33, under "Attachment 3."

12. It is unrefuted that Petitioner's aforementioned email dated July 24, 2014, was not responded to by anybody addressed in the email, particularly the DC Zoning Administrator, Mr. Matthew Legrant, who never responded to Petitioner's alert and never wrote any letters of determination about the subject project. *See Exhibit #14E, Page 3, second and third paragraph.*
13. The Respondent, DCRA issued Permit #B1309151 to the Intervenor on this same day, July 24, 2014. *See Exhibit #2, Page 9, labeled "Attachment 2."*
14. And, on this same day, July 24, 2014, Intervenor sent notice by certified mail to the Petitioner that DCRA had issued a building permit for the subject project. *See Exhibit #2, Page 6, labeled "Attachment 2."*
15. Petitioner's first received this notice, and copy of Permit #B1309151, two days later on July 26, 2014. *See Exhibit #2, Page 7, labeled "Attachment 2."*
16. On August 4, 2014, Petitioner's visited DCRA's records office in Southwest, DC, seeking a copy of the Intervenor's project plans as approved by Respondent, DCRA. Petitioner's were not able to access the plans during this visit. *See Exhibit #14E, Pages 39 to 41, labeled "Attachment 6."*
17. Petitioner's attempted to get a copy of the DCRA-approved project plans for the subject project over several weeks, as shown in email exchanges between the Petitioner, the counsel for the Respondent, DCRA, and the DCRA record office representative. *See Exhibit #14E, Page 56, among others, labeled under "Attachment 6."*
18. It is unrefuted that on September 19, 2014, Intervenor delivered a copy of the DCRA-approved project plans to Petitioner's for the first time. *See Transcript, Page 60, Line 14.*
19. Ten days later, Petitioner's filed BZA Appeal #18888 dated September 24, 2014.
20. Despite not being able to get the approved-DCRA plans until September 19, 2014, Petitioners also submitted an appeal of the subject project to the DC Office of Administrative Hearings on August 7, 2014. OAH Appeal #2014-DCRA-00050 was docketed and heard on October 28, 2014. The OAH appeal contended with multiple rooftop structures, among other issues with the subject project. *See Exhibit #14E, Page 94.*
21. It is unrefuted that on December 8, 2014, the OAH issued a Final Order in OAH Case #2014-DCRA-00050, ultimately denying relief to Petitioner's regarding multiple rooftop structures among other issues associated with the subject project.

Conclusions of Law: Timeliness

22. The BZA is authorized to hear appeals when the Respondent, DC Department of Consumer Regulatory Affairs (DCRA) issues a building permit which aggrieves DC residents. *See 11-DCMR-3100.2.*
23. Aggrieved residents, like Petitioner's, have 60 calendar days to appeal to the BZA from the date of DCRA's final decision to issue a permit, unless the Board agrees to extend this jurisdictional deadline. *See 11-DCMR-3112.2(a) & 3112.2(d).*
24. Petitioner's received noticed that DCRA made the final decision to issue a building permit for the subject site on July 26, 2014. *See Point #15 above.*
25. Petitioner's filed BZA Appeal #18888 on September 24, 2014, within the 60 calendar days required by the Zoning Regulations. *See Point #1.*
26. Intervenor's Motion to Dismiss BZA Appeal #18888 argues that since Petitioner's were able to access DCRA's online permit system (PIVs), that Petitioner's ought to have known that DCRA's Zoning Administrator (ZA), Mr. Legrant approved zoning review for the subject property on July 14, 2014.
27. To support their argument, Intervenor submitted a snapshot of the PIVs system showing that the ZA approved the subject project on July 14, 2014. The Intervenor's snapshot of the PIVs site is dated August 27, 2014, nearly a month after Petitioner's testified they were on the site.
28. Petitioner's have demonstrated to the BZA that when they visited the PIVs site on July 24, 2014, there was no information available that indicated a building permit had been issued, let alone that the ZA approved the zoning review for the subject property. *See Points #9, 10, 11, 12*
29. Further, Petitioner's have demonstrated that despite sending a email letter inquiring of the status of the building permit on July 24, 2014, as delivered to Respondent, DCRA, and to Mr. Matthew Legrant, the DC Zoning Administrator, Petitioner's never received a response from those addressed without any explanation of any decisions or informing Petitioner's of any appeal rights. *See Point #12 above.*
30. The Intervenor shows that the ZA's approval of the subject site was notated on the PIVs site as of August 27, 2014. *See Point #25 above.*
31. The Intervenor has not demonstrated that Petitioner's were given notice or made aware that the ZA approved the subject project at the time Petitioner testified they visited the PIVs site on July 24, 2014.
32. Petitioner's have demonstrated that were only notified of all regulatory approvals, and that DCRA made the final decision to issue a building permit, on July 26, 2014. *See Point #15 above.*
33. Further, it is unrefuted that Petitioner's first received Intervenor's design plans, plans approved by DCRA, on September 16, 2014. *See Point #18 above.*

34. In a telling prior BZA case, BZA APPEAL NO. 18469, its clear that Commissioners can set the timing of an appeal to when the ZA gave approval of the subject project. However, in BZA Appeal #18469, timing was set to the ZA's decision only after demonstrating that 1) parties in that case were made aware of the ZA's approval on the PIVs site, and 2) that the ZA had followed up with a letter to the parties explaining his/her decision to give zoning review approvals, and subsequently sending a letter offering information about the parties appeal rights.
35. In this case, BZA Appeal #18888, the Petitioner's testified they were neither informed about any regulatory approvals on the PIVs site, but also never received any response correspondence from the ZA despite inquiring directly with the ZA about the building permit for the subject project.
36. Therefore, in the instant case, Petitioner's have shown that on July 26, 2014, they first received notice that DCRA made the final decision to issue the building permit, and therefore timely filed BZA Appeal #18888 within the 60 calendar as required.
37. Petitioner's allege claims that the subject project contravenes the DC Zoning Regulations as they relate to two zoning spheres: Rooftops & Rear Yards. *See Point #2 above.*

Findings of Facts: Rooftops Claims

38. It is unrefuted that the proposed design plans show walls standing 12' 0" vertically from the roof. *See Exhibit #17, Page 11.*
39. The walls are adorned with a trellis embellishment, rising up 2'6" from those walls. The trellis runs the length of the walls that it is attached to and, and from the bird's eye forming a "U" shape on the roof as highlighted in blue. *See Exhibit #17, Page 10.*
40. The trellis does not extend out across rooftop space horizontally, and thus is not acting as a protective cover over, or as a ceiling above any rooftop space. *See Exhibit #17, Pages 6, 7, and 10.*
41. The trellis is referred to as "decorative" by the DC Office of Planning. Exhibit XX.
42. It is unrefuted that many rooftop mechanical structures are located on the south-west side of the roof, but which are not wholly- or partially-enclosed behind any walls or structures. *See Exhibit #17, Pages 4 and 7; See Transcript Pages 109 to 110.*
43. Photographs of the rooftop structures were taken by Petitioners from the roof of the adjacent building at 1736 Columbia Road, NW, located at the south-west side of the project site. *See Exhibit #18, Page 3; See Exhibit 22, Page 10, labeled "RTE9."*
44. It is unrefuted that Petitioner's photographs show at least one additional structure resembling a "doghouse" located on the roof which is not found in the approved DCRA design plans. *See Exhibit #17, Pages 4 and 7.*

45. And, it is unrefuted that the aforementioned photographed structure, now on the roof, is not enclosed within the blue "U" shaped rooftop walls. *See Transcript Page 98, Line 12 to Page 99, Line 13.*
46. Further, it is unrefuted that there exist inter-connected rooftop walls standing vertically at 6' foot in height, and which extend out all way to the edge of the rooftop, partially enclosing the many proposed rooftop patios. *See Exhibit #17, Pages 4 and 5. Also see Transcript Page 93, Lines 2 to 13 and Pages 109 to 110.*
47. Intervenor's design plans, which were submitted to and approved by the Respondent, DCRA, depict an elevator over-ride structure which is taller than the rooftop stairwell structures, referred to as "doghouses by the Intervenor. *See Exhibit #17, Pages 2, 3, 8, and 11.*

Conclusions of Law: Rooftops Claims

48. The DC Zoning Regulations control what may happen on the roofs of buildings in DC, particularly as it pertains to rooftop structures and setbacks of those structures, as well as structures enclosing mechanical equipment. *See 11-DCMR-411 and 11-DCMR-770.*
49. The zoning regulations specifically say that, "All penthouses and mechanical equipment shall be placed in one (1) enclosure, and shall harmonize with the main structure in architectural character, material, and color," and that "Enclosing walls from roof level shall be of equal height, and shall rise vertically to a roof." *See 11-DCMR-411.3 & 411.5.*
50. Intervenor argues that the walls on the roof connecting the stairwell structures, or "doghouses" form one enclosure, and that the trellis on top brings this enclosure to one equal height.
51. Petitioner's have demonstrated that there are multiple rooftop structures being proposed in the subject project and that these multiple structures stand at differing heights.
52. Petitioner's have shown DC planning officials consider the subject trellis as a decorative embellishment.
53. The difference between a decorative trellis and a trellis that is considered part of the building structure was made clear in the Final Orders of BZA Case #18263B and BZA Case #17331.
54. In the context of these prior BZA Cases, the subject trellis is definitively decorative and does not serve as a structural component of the walls, and certainly cannot be considered a roof covering any rooftop area.
55. Further, Petitioners have shown that not all rooftop mechanical equipment sit behind the "U" shaped wall structure. *See Point #45 above.*
56. Therefore, the enclosing walls do not rise to a roof, and because all mechanicals do not sit behind these enclosing walls, the subject project will require zoning relief.

57. And, since the trellis is only decorative, and not considered a roof structure, any argument by Intervenor that the multiple doghouses and the elevator overrun structure are brought to equal height by this trellis is erroneous, and thus these varying rooftop structure heights requires zoning relief.
58. Further, Petitioner's have demonstrated that the rooftop wall structure that encloses the mechanicals and doghouses, also consists of wall components that stand at 6' feet in height and extend out to the edge of the rooftop.
59. DC Zoning Regulations require that rooftop structures be set back, "...a distance at least equal to its height above the roof upon which it is located." *See 11-DCMR-770.6(b)*.
60. The rooftop enclosure wall structure extends to the edge of the building, despite standing 6' tall. These walls should be at least 6' away from the edge of the rooftop. Therefore the Intervenor's subject project requires zoning relief.

Findings of Facts: Rear Yard Claims

61. It is unrefuted that a subterranean garage is part of, and will serve the subject building now being constructed at the subject site.
62. It is unrefuted that there is a ramp connected to the subject building as the entrance/exit of the aforementioned subterranean garage.
63. Further, it is unrefuted that the garage ramp has three walls partially surrounding it. *Transcript Page 84; Lines 15 to 22.*
64. The most southern ramp wall extends the length of the ramp along the rear property line, all the way to the 17th street property line.
65. It is unrefuted that the garage ramp has metal beams that extend across the width of the ramp, with the beams attached as part of, and resting on all three ramp walls. *See Exhibit #18, Page 4 to 5.*
66. It is unrefuted that these metal beams attached to the ramp walls will serve as a platform on which will sit a diesel-gas generator.
67. This generator, and accompanying exhaust vent and diesel gas tanks, will sit less than ten feet from the subject building, and will stand 8' 6" above grade.
68. It is unrefuted that the garage ramp and 3-sided partially enclosing ramp walls with its attached metal beam platform, occupies more than 50% of the subject site's rear yard.
69. The DC Office of Planning has affirmed that the ramp occupies "the majority" of the rear yard of the subject site.

Conclusions of Law: Rear Yard Claims

70. DC Zoning Regulations say that that 50% of the required rear yard cannot be occupied. In this case it is occupied by a ramp structure, and further this structure has a platform which will hoist a diesel-gas generator and subsequent tanks above the ramp, standing at 8'6" above grade, and all of which sit in the rear yard. This requires zoning relief. *See 11-DCMR-199 & 11-DCMR-774.*

CONCLUSION

For the above reasons, the Petitioner has proven that zoning relief is necessary. Thus, the BZA orders Intervenor to apply for zoning relief as it relates to rooftop structure relief and rear yard relief.